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IN THE
Supreme Court of the United States

October Term, 1947.

No.

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The undersigned on behalf of J. Gerber Hoofnel (and for other ex-employees of Lockheed Overseas Corporation similarly situated) prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case, numbered therein 11,593. By general agreement, the *Hoofnel* case and *Downs v. Commissioner* (No. 11,578 in the court below) were stipulated to be tried together in the Tax Court, and were argued together and disposed of in one opinion in the Circuit Court of Appeals, although they were therein separately briefed [R. 88] and separate judgments were therein rendered. [R. 101.]

Opinions Below.

The opinion and decision of the Tax Court finding for the Commissioner appears at 7 T. C. 1136 and at R. 58.

The opinion and Judgment of the United States Circuit Court of Appeals for the Ninth Circuit, 68 F. (2d) is published in full at R. 88 and 101. Two members of the Tax Court dissented on the second joint involved. [R. 62.]

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals was entered January 27, 1948, and no rehearing was invoked and this petition is presented within three months from the date of said judgment. Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended 43 Stat. 938 (28 U. S. C. A., par. 347a).

Questions Presented.

1. In the *Hoofnel* and *Downs* cases, so far as the tax on their 1943 overseas income is concerned, the facts are basically the same and present the same legal problems. To simplify these proceedings and avoid duplication, petitioner assumes it would please your Honorable Court that he abide in this case your decision in the *Downs* case regarding the tax on his 1943 overseas income, and, would ask that this Court consolidate the two cases for that reason, if that can be done.

2. The only question that remains for this Court's consideration is of secondary importance to the foregoing and may briefly be stated as follows:

3. Was an American citizen, a bona fide non-resident of the United States within the meaning of Section 116

(a)(1) of the Internal Revenue Code if he on June 30, 1942, boarded in New York harbor, a convoyed vessel of British registry with British officers under war and submarine conditions then prevailing?

Statement.

Section 116(a)(1) as it read in 1942, provided that there should be exempted from taxation, earned income from a source without the United States of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year. [R. 59.]

Under contract of employment by Lockheed Overseas Corporation, J. Gerber Hoofnel embarked on June 30, 1942, on H. M. S. Maloja, a vessel of British registry, with British officers at New York Harbor. He was restricted to the boat and could not communicate with anyone from it. [R. 80.] This was on account of guarding against submarine danger. [R. 60.] It was stipulated that the vessel did not get out of New York Harbor until the morning of July 1, 1942. [R. 60.] His domestic salary was \$1420.59 for the first half of 1942, and \$2,600 was his overseas salary for the second half of 1942. [R. 9.]

As stated in the opinion of the Circuit Court, the *Downs* and *Hoofnel* cases were tried together before the Tax Court. [R. 88.]

According to the *Downs* Record, he also, on June 30, 1942, in New York Harbor boarded the *Orangi*, a transport of British registry with a British captain and officers. [Downs, R. 15.] The two transports were unquestionably in the same convoy.

Downs' testimony at the joint hearing, before the Tax Court, about the embarkation situation at New York and the sailing of the convoy is more vivid than that of Hoofnel:

Downs testified,

"Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk with anyone or use the telephones, and we stayed in that room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn't want anyone to know about it. It was an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines." [Downs, R. 83.]

It is interesting to note:

1. That while Downs apparently did not leave New York Harbor until after midnight of June 30, 1942, he was not taxed by the Commissioner on his overseas 1942 income. [Downs, R. 12.]

2. That two Judges of the Tax Court dissented and held that Hoofnel was not taxable on his 1942 overseas income. [R. 62.]

Reasons Relied on for Granting of the Writ.

1. The reasons given in part IV of the Downs petition fully cover the question as to tax on Hoofnel's overseas salary for the year 1943; this involves the conflict of the decision in the Ninth Circuit in the *Downs* and *Hoofnel* cases with that of the Fifth Circuit in *Swenson v. Thomas*, 164 F. (2d) 783. These reasons appear in part IV, subdivisions 1 to 5, inclusive, in the Downs petition.

2. The second and further reason why this writ should be granted is that in this case of *Hoofnel v. Commissioner* the Ninth Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court, namely:

Is an American citizen "outside of the United States" when he is aboard a vessel belonging to a foreign government about to sail in a secret convoy under war conditions such as prevailed June 30, 1942?

Wherefore, petitioner prays that a Writ of Certiorari be granted.

ROBERT A. WARING,
Attorney for Petitioner.

LAWRENCE M. CAHILL,
Of Counsel.

State of California, County of Los Angeles—ss.

Robert A. Waring, being first duly sworn, deposes and says that he is the attorney for the petitioner named¹ in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true. Counsel further certifies that the petition is well founded, and is not interposed for delay.

ROBERT A. WARING.

Subscribed and sworn to before me this 23rd day of April, 1948.

MARGUERITE F. CRIPPS,

*Notary Public in and for the County of Los Angeles,
State of California.*

My commission expires January 3, 1952.

IN THE
Supreme Court of the United States

October Term, 1947

No.

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

The brief just heretofore filed with your Honorable Court in *Downs vs. Commissioner* fully covers the question of the tax assessed against petitioner on his 1943 overseas salary.

As to whether Hoofnel was absent from the United States on embarking on the British transport in New York harbor on June 30, 1942, petitioner contends that the hazards of war should have been taken into consideration in this case. Vessels of the Allies leaving American ports did not dare reveal any detail of their departures because of the terrifying menace of the German submarine war-

fare. The ordinary rules of port were not being observed. Petitioner was to all intents and purposes completely under the jurisdiction of the British officers and they, under the necessary rules of the war, were independent in their actions.

In conclusion petitioner prays that this Writ may be granted.

Respectfully submitted,

ROBERT A. WARING,

Attorney for Petitioner.

LAWRENCE M. CAHILL,

Of Counsel.